85350-9
38411-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RSUI, Intervenor Below and Appellant,

v.

VISION ONE, LLC, Plaintiff, Respondent and Cross-Appellant,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,
Defendant, Appellant and Cross-Respondent,

and

D&D CONSTRUCTION, INC.; Defendant, Third-Party Plaintiff, and
Respondent,

v.

BERG EQUIPMENT & SCAFFOLDING CO., INC., Third-Party
Defendant and Respondent

BRIEF OF APPELLANT/INTERVENOR RSUI

One Union Square
600 University, Suite 2700
Seattle, WA 98101-3143
(206) 467-1816

McNAUL EBEL NAWROT &
HELGREN PLLC

Michael D. Helgren, WSBA No. 12186
Barbara H. Schuknecht, WSBA No. 14106
David R. East, WSBA No. 31481
Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes and Court Rules

I. INTRODUCTION

This appeal is about whether a trial court's desire to start a trial on a particular day, understandable as that is, can trump a non-party insurer's request for a two week opportunity to obtain discovery about a settlement. For the insurer the stakes were enormous. The settlement included a covenant to execute only against the insurer, an assignment of the insured's alleged bad faith and coverage claims, and a stipulated judgment against the insurer for $2.3 million – an amount the settling parties claim is subject to trebling under RCW 48.30.015, the Insurance Fair Conduct Act ("IFCA"). That the insurer needed time to conduct discovery was beyond dispute, as the insurer received just three days notice of the settlement and of the trial court's reasonableness hearing, and in the six months preceding the settlement, the insured had stopped communicating and cooperating with its insurer.

The trial court denied the insurer's request for an opportunity to conduct discovery and, despite having little or no evidence upon which it could make an informed judgment, found the settlement reasonable. For the insurer, this result was a rush to judgment and a denial of fundamental rights. While the propriety of the insurer's and its insured's conduct are the subject of claims currently being litigated in federal district court, the insured's conduct is also significant here because it reflects the effect of the IFCA's treble damages provision on insurers and insureds. Instead of working with their insurers, insureds and the parties who seek recovery

from them have a huge incentive to stipulate to non-recourse judgments and assign treble-damage bad faith claims against the insurer.

With this appeal, appellant/intervenor RSUI asks the Court of Appeals to vacate the trial court order approving the settlement, and to remand this matter to the trial court for a fully informed assessment of the agreement's reasonableness and whether it is affected by fraud or collusion. Doing so will not require substantial discovery or inquiry, as the parties engaged in extensive discovery in a related coverage action pending in the U.S. District Court for the Western District of Washington, *RSUI v. Vision One, LLC, et. al.,* No. C08-1386RSL.[1] A remand will, however, ensure that the presumptive measure of damages in any action Vision One might pursue against RSUI is one that fairly reflects the value of its claims.

---

[1] As counterclaims in that coverage action, RSUI's insured, Berg Equipment and Scaffolding Co. ("Berg"), and the parties with whom Berg settled and assigned its alleged bad faith claims, allege that RSUI engaged in bad faith, violated the IFCA, and violated the Consumer Protection Act, RCW Ch. 19.86 *et seq.* Pursuant to the IFCA, the parties seek treble damages of $6.9 million from RSUI. In defending these counterclaims, RSUI sought and obtained evidence of the settling parties' communications concerning the settlement. Those communications presumably are the same communications RSUI would have obtained had the trial court permitted RSUI any meaningful opportunity for discovery prior to the reasonableness hearing.

As a result of discovery in the coverage action, upon remand, the trial court could reconsider the reasonableness determination at issue in this appeal in less than a day and without any further expense. With this appeal, RSUI simply asks for the opportunity to present to the trial court, the evidence it obtained in the federal action so that the trial court can make an informed decision as to whether a stipulated judgment of $2.3 million (against policy limits of over $1 million and for which $6.9 million is being sought) was reasonable.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1: The trial court erred in proceeding with a reasonableness hearing for which RSUI received just three days notice, denying RSUI's motion for a continuance, and in refusing to allow RSUI any reasonable opportunity to assess the settlement's reasonableness and determine whether it was affected by fraud or collusion.

Issue Pertaining to Assignment of Error

Whether, when a proposed settlement relieves the insured of all liability, purports to establish presumptive damages of $2.3 million against an insurer and potential damages of $6.9 million, it is reversible error to refuse to grant the insurer's motion to continue a reasonableness hearing when:

a. The insured stopped communicating with the insurer at the same time it began negotiating a settlement designed to shift virtually all liability to the insurer;

b. All claims and defense information available to the insurer predated the settlement by at least six months and the settlement was for an amount substantially higher than a settlement offer the insured had rejected at that time;

c. The insurer learned of the settlement just three days before the reasonableness hearing; and

d. The settling parties proffered no evidence supporting the reasonableness of the settlement amount and instead relied on conclusory assertions about the value of the claims at issue.

Assignment of Error 2: The trial court erred in approving the settlement, finding it to be reasonable, and in entering the following findings:

(1) "Per court's remarks on the record, [t]he settlement herein is reasonable in light of the factors set forth in Glover v. Tacoma General Hospital and The Heights at Issaquah Ridge Owners Association v. Derus Wakefield, as to the contractual settled claims and the tort settled claims." CP 505 (FOF 1) (footnotes omitted).

(2) "There is no evidence of fraud or collusion in the settlement herein." CP 505 (FOF 2).

(3) "[T]his is a reasonable settlement ...." CP 506 (FOF 4).

Issue Pertaining to Assignment of Error

Whether it is reversible error for a trial court to approve a settlement as reasonable and to thereby establish an excess insurer's presumptive liability at $2.3 million, and its potential liability at $6.9 million, when the settling parties failed to present to the trial court:

a. Any evidence supporting the settlement amount;

b. Any evidence identifying what claims were encompassed by the settlement or their value;

c. Any evidence explaining the relative strengths and weaknesses of the claims and defenses at issue; and

d. Any evidence explaining why the insured quit communicating with its insurer at the same time it began

negotiating a settlement that dramatically increased the insurer's exposure.

III. STATEMENT OF FACTS

A. Facts Related to RSUI's Excess Insurance Policy and Its Coverage Denial

RSUI issued a $1,000,000 policy of excess insurance to Berg Equipment and Scaffolding Co. ("Berg") for July 1, 2005 to July 1, 2006. The policy expressly excluded coverage "for any liability arising out of" Berg's work or operations "on any 'residential project.'" Supp. CP [9/12/08 Frye Decl. (filed 7/23/09), Ex. D]. Under the policy, a condominium project is, by definition, a "residential project." *Id.*

Berg performed concrete-related work on the Reverie Condominium Project. On October 1, 2005, a section of newly poured concrete collapsed at the project and several workers were injured. Multiple lawsuits ensued. In their pleadings, all parties, including Berg, described the project where the collapse occurred as a "Condominium Project." *E.g.,* CP 1, 5, 54, 58, 60, 113. Roger Hebert, a principal of the project owner, stated in a declaration that the "Vision One LLC is the owner/developer of ***a condominium project*** called Reverie located in Tacoma." CP 223 (emphasis added).

Berg notified its primary insurer, Admiral, and its excess insurer, RSUI, of the incident. Although excess insurers owe no duties to insureds until primary insurance limits are exhausted,[2] as a courtesy to its insured,

---

[2] *Rees v. Viking Ins. Co.,* 77 Wn. App.716, 719, 892 P.2d 1128 (1995).

RSUI informed Berg in April 2007 that, based on the facts and information provided by the insured, it was denying coverage under the policy's residential work exclusion. CP 329; 9/15 RP 42-43. Nonetheless, RSUI repeatedly encouraged Berg to provide further information that might show why the residential work exclusion did not apply to work performed on the Reverie Condominium Project. *See* Supp. CP [9/12/08 Frye Decl. (filed 7/23/09), Exs. A-B]. Berg never did.

B. Berg's Post-Coverage-Denial Communications With RSUI

Berg never provided RSUI with facts or evidence as to why the residential project exclusion of its policy did not apply to claims arising from the Reverie Condominium Project. It did, however, continue to send RSUI information about the status of the Condominium Project-related claims being litigated in Pierce County. Daniel Mullin, the defense attorney for Berg, stated in his declaration:

> I have represented Berg since the outset of this litigation. Early on in the proceedings we were made aware of an excess carrier for Berg, RSUI. ***We communicated with RSUI and shared confidential reports and information with them on a regular basis.***

CP 332 (emphasis added); *accord* CP 337; *see* CP 335, 448.

In January 2008, Mr. Mullin notified RSUI of an upcoming mediation of claims involving the Condominium Project. CP 333, 337. Prior to the mediation, RSUI's coverage counsel spent approximately two hours at Mr. Mullin's office collecting documents so that RSUI could review and analyze them for the mediation and for information relevant to coverage. CP 427, 430-33. During that document review session,

however, Mr. Mullin's colleague told RSUI's counsel that it should direct any future RSUI requests for information or documents to Berg's personal counsel, Peter Petrich. CP 427, 448-49. In short, Berg's defense counsel no longer wished to cooperate with RSUI.

RSUI sent an attorney to attend the mediation, CP 448, and had its claims adjuster available by phone to reevaluate its coverage position, if appropriate. Confidentiality requirements prevent RSUI's attorney from disclosing what he said and what the mediator and others said to him.[3] Regardless, the mediation was unsuccessful. CP 333. Shortly after it concluded, however, Vision One, Vision Tacoma and a third party (collectively, "Vision One") offered to settle all claims against Berg for $2,500,000, with Berg paying $500,000, Admiral paying its policy limits of $1,000,000, and the remaining $1,000,000 to be collected from RSUI, if possible. CP 343. Vision One further offered to enter into an agreement making its own insurers "fully responsible for all bodily injury claims relating to the October 1 event." *Id.*

On February 19, 2008, Berg forwarded a copy of Vision One's offer to RSUI. CP 333, 342-43. RSUI's attorney called Berg's attorney

---

[3] RCW 5.60.070(1); RCW 7.07.030-.070. Other attorneys involved in this matter have ignored these statutory requirements and made assertions about what RSUI's attorney allegedly said at the mediation. Their assertions are inaccurate, but pursuant to RCW 5.60.070(1) and RCW 7.07.030-.070, it would be inappropriate for RSUI's attorneys to rebut them. *See* CP 448 (RSUI's attorney's declaration stating he would provide evidence of what occurred at the mediation if all the parties agreed to waive confidentiality requirements). Should respondents recite confidential and privileged mediation information in their answering briefs, RSUI will move to strike under the statutes cited above.

and asked if Berg was "interested in settling for those amounts. He [Berg's attorney] said 'no.'" CP 448.

C. Berg's Sudden Change in its Communication Practices

Soon after Berg's attorney advised RSUI that Berg had no interest in settling for $2.5 million (some six months before it agreed to settle for $3.3 million, so long as Berg paid nothing), Berg and its attorneys changed their prior practice and stopped communicating with RSUI and its attorneys. They did so despite RSUI's repeated requests for information. Specifically, pursuant to Mr. Mullin's request that RSUI communicate with Berg through Mr. Petrich, Berg's personal and insurance coverage attorney, CP 427, 448-49, RSUI's counsel twice wrote to Mr. Petrich and also left several telephone messages for him, CP 448-49; Supp. CP [9/12/08 Frye Decl. (filed 7/23/09), Exs. A-B]. Mr. Petrich never responded. CP 448-49. RSUI's counsel asked Berg attorney Mullin to have Mr. Petrich contact him. CP 449. Again, no response. CP 449; *see* Supp. CP [9/12/08 East Decl. (filed 7/23/09)]. In short, from March 2008 until September 9, 2008, Berg and its attorneys abandoned their prior communications practices and flatly refused to communicate with RSUI. Supp. CP [9/12/08 East Decl. (filed 7/23/09)]; Supp. CP [9/12/08 Frye Decl. (filed 7/23/09)].

D. Berg and Vision One Secretly Settle and Obtain a Reasonableness Determination Without Providing Meaningful Notice, Without Providing Evidence Establishing the Bases for the Settlement Amount, and Despite Circumstantial Evidence of Collusion or Fraud

Berg and its attorneys evidently broke off communications because they did not want RSUI to know they were working on a settlement that would substantially increase the settlement amount and focus on RSUI as Vision One's primary source of recovery. Berg and Vision One reached a $3.3 million settlement on September 4, 2008. CP 160, 448-51. Five days later, they disclosed that settlement. Specifically, on Tuesday, September 9, 2008, Vision One's attorneys sent RSUI's counsel an unsigned copy of the settlement agreement and notified them that a settlement reasonableness hearing was scheduled for Friday, September 12, 2008. CP 155, 158-70.

The agreement provided in relevant part that Berg's primary insurer, Admiral, would pay Vision One $1 million, and that:

> Berg's Assignment Regarding Excess Insurance. Berg agrees to assign its rights against RSUI and to a stipulated judgment ... in favor of Vision One in the net sum of an additional Two Million Three Hundred Thousand Dollars ($2,300,000.00), and Vision agrees and covenants not to execute against Berg for any of this stipulated judgment. Any recovery of such sums shall be solely from Berg's liability insurers, other than Admiral but including without limitation, RSUI....

CP 162. In short, the settlement allowed Vision One to pursue RSUI for $2.3 million, more than twice its $1 million policy limit and, if Vision One could establish bad faith actionable under the IFCA, for $6.9 million plus attorney fees and costs.

RSUI moved on shortened time to intervene in and to continue the reasonableness hearing for which it had received just three days notice. CP 116-40, 146-83, 345-46. RSUI sought a two week continuance of the hearing (to September 26) so it could explore the $1.3 million (before potential IFCA trebling) increase in the amount Vision One sought from RSUI that had occurred between February and September 2008, and the $800,000 increase in the total settlement value of Vision One's claims that occurred during the same period. RSUI argued that court rules and case law require more than just three days notice of a reasonableness hearing. CP 149-53. RSUI also asked for the two week continuance because its lead counsel, the only RSUI attorney with knowledge of the parties' claims, defenses and damage assertions, was vacationing until September 15. *Id.*

Another insurer targeted by the settlement agreement, Philadelphia Indemnity, protested provisions in the agreement that foreclosed its potential subrogation rights. CP 229-41. As had RSUI, Philadelphia pointed out that three days is too little time to review a settlement and prepare for a reasonableness hearing, and further argued that at a minimum, due process requires that it have "time to prepare and respond to charges, and a meaningful hearing[.]" CP 239. Philadelphia accordingly asked the trial court to refuse to conduct a settlement reasonableness hearing at all, or at least to delay the hearing until Philadelphia had an opportunity to prepare, respond and address legal issues arising from the proposed settlement. CP 240. Philadelphia did so

even though it was a party in the underlying case and thus, unlike RSUI, was familiar with events that transpired after the February 2008 mediation. *See* CP 1.

Berg and Vision One did not object to RSUI's motion to intervene, but did object to its request for a continuance. CP 320-23, 394. Incredibly, Vision One argued that RSUI's complaints of inadequate notice failed because trial allegedly began on September 8, 2008 (when prospective jurors filled out questionnaires), and the commencement of trial negated all notice requirements. CP 321-22. Not only did that argument ignore constitutional guarantees of adequate notice, Vision One's argument raised the question of whether Berg and Vision One waited five days – from September 4 until September 9 – to notify RSUI of the settlement in order to limit RSUI's time and opportunity to challenge its reasonableness. CP 158-60.

More troublesome, though, were misstatements Berg and Vision One made about RSUI. Both advised the trial court that RSUI refused to participate in settlement negotiations and had not sought additional information from them. CP 207-08, 321-22, 333. In fact, as explained above, RSUI did attend the February mediation and later inquired whether Berg would consider settling for the $2.3 million sought by Vision One in its February 19 offer. CP 448-49. Further, it was Berg and its lawyers that suddenly stopped communicating with RSUI in March 2008 – not the other way around – and it was Berg and its lawyers that refused to respond to RSUI's repeated requests for information or even return telephone calls

between March and September 2008. CP 448-49; Supp. CP [9/12/08 Frye Decl. (filed 7/23/09) & Exs. A-B]; Supp. CP [9/12/08 East Decl. (filed 7/23/09)].

At the Friday, September 12 hearing, the trial court informed RSUI it would not delay its reasonableness determination beyond Monday, September 15, apparently because trial was about to commence. 9/12 RP 10-11. The court also told the associate appearing for RSUI that he could have the weekend to assess the settlement's reasonableness and find evidence of fraud or collusion. 9/12 RP 10-11, 53-54. The hearing concluded at 4:06 pm. CP 394. At 4:30 pm, a legal assistant for RSUI sent an information-seeking email to counsel for all involved parties, including Vision One and Berg:

> Pursuant to the Court's order directing that we be prepared to contest the reasonableness of the settlement on Monday, September 15, 2008, please forward all information pertaining to the liability of insured, Berg, the claims against Berg that have been resolved in the proposed settlement, how the figure of $3.3 million was determined to [counsel for RSUI] as soon as possible and no later than 9:30 a.m. on Monday, September 15.

CP 456.

Only two attorneys responded to that email. CP 453-73, 9/15 RP 33. Personal counsel for Berg, Mr. Petrich, sent a 4:33 pm email offering to make documents available in his office for the next 27 minutes in Tacoma, knowing RSUI's counsel's office was in Seattle. CP 458. Moreover, as Mr. Petrich no doubt knew, RSUI – whose attorney was then traveling from the Pierce County hearing to his Seattle office – would be

unable to respond to the email before Mr. Petrich's 5:00 pm deadline. CP 464; *see* 9/15 RP 33.

After another exchange of emails, Mr. Petrich informed RSUI's counsel on Sunday, September 14, that even though he had spent 61.5 hours negotiating the Berg/Vision One settlement, CP 329, he did "not have any case status reports, valuations, correspondence relating to the settlement agreements, or documents relating to the settlement other than (potentially) a handful of earlier drafts of the settlement agreement." CP 471. RSUI asked Mr. Petrich to email copies of any earlier settlement offers and agreement drafts to it by Monday morning (before the reasonableness hearing resumed). CP 471; 9/15 RP 33-34. Mr. Petrich declined to do so because "from [his] point of view," his files did not contain anything different or new that RSUI did not already have. 9/15 RP 35. Since Berg and Mr. Petrich had not sent any information to RSUI since March of 2008 despite RSUI's multiple requests that they do so, and since surely there was something in his files relevant to the $1.3 million increase in the stipulated judgment against RSUI, Mr. Petrich's "point of view" was unsupportable.[4] *See* CP 447-48; Supp. CP [9/12 Frye Decl. (filed 7/23/09), Exs. A-B).

---

[4] In fact, discovery in the federal action, *see* n.1, *supra,* resulted in disclosure of a substantial number of relevant emails, settlement drafts, and other matters that would have had significant impact on the trial court's reasonableness determination. On July 30, 2009, RSUI moved this Court for leave to supplement the record with illustrative examples of those materials. Berg and Vision One opposed RSUI's motion and the motion was denied. In precluding RSUI from obtaining key evidence before the reasonableness hearing and in opposing RSUI's motion to supplement the record with evidence obtained in the federal court action, those parties continue to try to preclude any court from

Mr. Mullin, Berg's defense counsel in the Pierce County litigation, responded to RSUI's request for information on Saturday afternoon, with an email indicating he would let RSUI review his files for so long as he remained in the office that day. CP 461. RSUI replied to Mr. Mullin's email on Sunday, and asked that it be allowed access to Mr. Mullin's office on Sunday afternoon or Monday morning, or that Mr. Mullin email copies of relevant materials to RSUI. CP 467. Mr. Mullin never responded. 9/15 RP 33-34, 40-41.

After oral argument on September 15, the trial court reiterated that it would not continue its reasonableness determination since trial was set to commence. 9/15 RP 66. Based primarily on the fact the case had been "hotly contested," "hard fought and difficult," the court entered an order finding the settlement to be reasonable. 9/15 RP 52-55; CP 483-87; *see also* CP 490-91. Whether Berg had fought hard was no longer relevant, since Berg would pay nothing under the $3.3 million settlement agreement. More importantly, the court found the settlement reasonable even though Berg and Vision One failed to: (1) provide expert testimony or analysis supporting the $3.3 million settlement; (2) explain what claims the settlement encompassed (personal injury vs. construction delay vs. costs of repair, etc.); (3) describe the relative strengths and weaknesses of Vision One and Berg's claims and defenses; (4) give any indication of what occurred during the negotiations that resulted in the settlement; (5)

---

learning of information that RSUI could have obtained with reasonable pre-reasonableness hearing discovery.

compare the $3.3 million settlement with damages awarded in similar cases; or (6) provide any other evidence relevant to the reasonableness of the settlement amount. *See* CP 206-28, 324-44, 426-33, 492-95.

Instead, Berg and Vision One relied on conclusory assertions made in two declarations. The first was a declaration by Vision One's principal, Mr. Hebert, asserting that Vision One had delay and debt interest damages that his experts computed at "4.5 to 5 million dollars." CP 224. No expert report supported that claim and Mr. Hebert did not explain how, why, or to what extent those damages could be attributed to Berg. The second was a declaration by Mr. Petrich, Berg's personal and coverage counsel. He simply asserted that Vision One's claims were "approximately $5.5 million dollars" and "Berg's defense to these claims is solid." CP 329. Mr. Petrich provided no evidence supporting his assertion about the value of Vision One's claims. Nor did he explain what claims the settlement encompassed or describe the nature of Berg's defenses. CP 329-30.

In addition to finding the settlement amount reasonable despite an absolute lack of supporting evidence, the trial court rejected RSUI's concerns that the settlement was fraudulent and collusive, apparently because RSUI had no direct evidence of fraud or collusion. 9/15 RP 41, 52-55. In so doing, the trial court ignored RSUI's circumstantial evidence – evidence that, at a minimum, should have persuaded the court to allow RSUI time to explore the terms of the settlement and ascertain whether Berg and Vision One had inflated the value of Vision One's claims and/or worked together to manufacture a bad faith/IFCA claim against RSUI.

That circumstantial evidence included Berg having stopped communicating with RSUI at the same time it engineered a settlement potentially subjecting RSUI to $2.3 million (or potentially up to $6.9 million, if actionable under the IFCA) in liability and Berg's attorneys having stonewalled RSUI's attempts to acquire information from March 2008 through the September 15 hearing. *See* 9/15 RP 54-55.

On October 15, 2008, RSUI filed a notice of appeal from the reasonableness determination. CP 500-15. On October 16, 2008, Vision One and Berg filed a stipulated order dismissing all claims against one another except the $2.3 million stipulated judgment Vision One agreed to collect only from RSUI. CP 519-24; *see* CP 162-63. The other parties continued to trial, which resulted in a verdict in favor of Vision One and against Philadelphia for $1,148,428.00, plus interest, fees and costs. CP 525-26. Philadelphia and Vision One both appeal that judgment.

IV. SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

This Court reviews a determination of a settlement's reasonableness for an abuse of discretion. *Werlinger v. Warner,* 126 Wn. App. 342, 349, 109 P.3d 22 (2005). An abuse of discretion standard also applies to a trial court's denial of a motion for a continuance, although when lack of adequate notice raises due process concerns, a continuance denial is reviewed de novo. *Red Oaks Condo. Owners Ass'n v. Sundquist Holdings, Inc.,* 128 Wn. App. 317, 321, 116 P.3d 404 (2005).

A trial court abuses its discretion when it misapplies applicable law or renders a decision unsupported by the evidence. *In re Jannot,* 110 Wn.

App. 16, 22, 37 P.3d 1265 (2002), *aff'd on other grounds,* 149 Wn.2d 123, 65 P.3d 644 (2008). Here, the trial court refused to allow RSUI a brief continuance not because RSUI sat on its rights or failed to try to obtain information, but because the court wanted to get on with a trial that did not have to involve Berg or any matter resolved by the settlement. *Green v. City of Wenatchee,* 148 Wn. App. 351, 364, 199 P.3d 1029 (2009) (trial court's determination that a settlement is not reasonable does not affect the settlement's validity or require adjustment of the amount); *Meadow Valley Owners Ass'n v. St. Paul Fire & Marine Ins. Co.,* 137 Wn. App. 810, 820-22, 156 P.3d 240 (2007) (same). In so doing, the court ignored notice requirements imposed by statute, court rule and case law, and excused Berg's failure to allow RSUI access to settlement information even after the September 12 hearing. As Philadelphia pointed out, these actions deprived Philadephia and RSUI of due process.

Further, the trial court's reasonableness determination lacks evidentiary support and is wholly unreliable. The court found the settlement amount to be reasonable even though no settling party provided expert reports, damages assessments or other evidence of the type normally relied on in such cases. Instead, the court assumed the settlement was reasonable simply because the litigation had been contentious. That was an abuse of discretion.

Given the very real risk of fraud or collusion inherent in stipulated settlements involving covenants not to execute (particularly after enactment of the IFCA), the dearth of evidence supporting the settlement,

and the substantial evidence indicating that Berg had made a concerted effort to keep information from RSUI, the trial court committed reversible error when it denied RSUI's motion for a continuance and found the Berg/Vision One settlement to be reasonable. The resultant prejudice to RSUI is substantial, as that unreliable reasonableness determination could result in RSUI being presumptively liable for an inflated amount bearing no relation to Vision One's actual damages or to Berg's probable liability. *E.g., Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc.,* 165 Wn.2d 255, 266-67, 199 P.3d 376 (2008).

V. ARGUMENT

A. The Trial Court Abused Its Discretion and Prejudiced RSUI When It Refused to Continue the Reasonableness Hearing

When an insurer declines to be involved in a settlement fixing its insured's liability and a trial court deems the settlement reasonable, the settlement establishes the presumptive measure of damages for which the insurer may be held liable. *E.g., Mut. of Enumclaw,* 165 Wn.2d at 266-67. If, as is the case here, the settlement involves a covenant not to execute against the insured, there is a significant risk the insured will settle for an inflated amount in exchange for immunity from personal liability. *Red Oaks,* 128 Wn. App. at 322. Accordingly, to protect insurers against the risk of an excess or inflated judgment, a trial court's reasonableness determination must be reliable. *Id.*

As detailed above, RSUI received notice of the Berg/Vision One settlement just three days before the reasonableness hearing. CP 158-59.

The trial court denied RSUI's motion for a two week continuance, and instead limited its settlement "discovery" to two weekend days. 9/12 RP 10-11, 53-54; CP 394. Berg and Vision One stonewalled RSUI's weekend information requests, leaving RSUI (and the court) with no information with which they could analyze whether the $3.3 million settlement (a settlement Vision One hopes to treble under the IFCA) was a reasonable amount, or whether the settling parties engaged in fraud or collusion setting the settlement amount and/or in trying to manufacture bad faith claims against RSUI. CP 453-73; 9/15 RP 34-41.

The trial court committed reversible error when it denied RSUI's motion for a two week continuance. That the three days notice provided by Berg and Vision One was wholly inadequate as a legal matter, is demonstrated by the fact that every rule, statute or decision regarding settlement notices or hearings requires substantially more than three days notice. Under RCW 4.22.060(1), for example, a party intending to enter into a settlement must give five days notice to affected parties and the court. Pierce County Local Rule 7(a) requires parties to give six *court days* notice of a hearing.

Case law confirms that three days notice of a settlement and reasonableness hearing is legally inadequate, particularly for an insurer in RSUI's position. In *Howard v. Royal Specialty Underwriting, Inc.,* 121 Wn. App. 372, 89 P.3d 265 (2004), for example, the insurer had 30 days notice of the reasonableness hearing – not three – and unlike the instant case, Royal had up-to-date information about the case in its files. 121 Wn.

App. at 379-80. In *Meadow Valley,* the parties had a month in which to prepare for the reasonableness hearing. 137 Wn. App. at 821. In *Green,* the court continued a reasonableness hearing from December 15, 2005 until April 2006 (and then granted many additional continuances) so the insurer could review settlement-related materials. 148 Wn. App. at 359-60. Even when an insurer is fully involved in a case and has had full discovery as to the parties' claims and defenses, no court has even intimated that less than six days notice of a settlement by an insured would satisfy due process requirements. *See Red Oaks,* 128 Wn. App. at 322-25.

In contrast, RSUI received three days notice of Berg and Vision One's settlement and their reasonableness hearing. Even with the additional two weekend "discovery" days the trial court allowed RSUI, that was simply not enough time. It particularly was not enough time since Berg and Vision One failed to provide so much as a single document to RSUI during that additional two day period and for six months before that, Berg had refused to respond to RSUI's information requests. CP 448-49, 453-73; 9/15 RP 34-41.

A trial court abuses its discretion when it denies a continuance if there is no tenable basis for so doing. *State v. James,* 30 Wn. App. 520, 523-24, 635 P.2d 1102 (1981). The only reason ever advanced for refusing RSUI's request for a two week continuance was that the case was ready for trial. 9/12 RP 10-11; 9/15 RP 66. That was not enough to deprive RSUI of its fundamental right to adequate notice, particularly in the circumstances of this case. To reiterate, Berg and Vision One settled

on September 4, 2008, but waited five days (and one day after jury questionnaires were distributed), to notify RSUI of the settlement. CP 158-61, 321-22. The settlement extinguished all claims against Berg and thus alleviated any requirement that Berg go to trial. CP 161-70; *see Green,* 148 Wn. App. at 364 (validity of settlement and amount paid are unaffected by a reasonableness determination); *accord Meadow Valley,* 137 Wn. App. at 819-20.[5] Vision One had to, and did, participate in the trial with or without a reasonableness determination. *See* CP 525-26. In short, while delaying the reasonableness hearing might have caused some inconvenience, that inconvenience was no reason to deprive RSUI of any meaningful opportunity to investigate the validity of the settlement and the stipulated presumptive judgment to which it would be subjected.

A trial court also abuses its discretion in denying a continuance if prejudice to the party seeking the continuance outweighs any reason militating against a continuance. *See, e.g., James,* 30 Wn. App. at 523-24. It is beyond dispute that RSUI was prejudiced by the abbreviated notice of the Berg/Vision One settlement, and by its inability to engage in any meaningful review of the settlement's terms or investigate what appeared to be a concerted effort to inflate the settlement amount and create a bad faith claim against RSUI.

---

[5] Vision One and Berg made their settlement contingent upon approval by the trial court. CP 164. That was their unilateral choice, made for their own tactical reasons, and thus should have had no bearing on the need for an immediate reasonableness determination.

To reiterate, the effect of the trial court's reasonableness determination was to establish the presumptive measure of RSUI's potential liability to Vision One. *Mut. of Enumclaw,* 165 Wn.2d at 266-67. Accordingly, and particularly when a settlement involves a covenant not to execute against the insured, trial courts must make reliable reasonableness determinations in order to protect insurers against the risk of an excess or inflated judgment. *Red Oaks,* 128 Wn. App. at 322.

A reliable assessment of whether a settlement is reasonable requires a court to do more than accept at face value, conclusory assertions made by the settling parties, which is essentially what the trial court did here. *Howard,* for example, involved a $20 million personal injury settlement.[6] 121 Wn. App. at 376. In support of the agreement at issue in *Howard*, the settling parties submitted over 800 pages of evidence. Their evidence included attorney declarations, expert reports and evaluations of plaintiff's damages, correspondence between the settling parties' attorneys, a list of discovery conducted in the suit, copies of deposition exhibits, excerpts from video depositions, and verdicts and settlements in similar cases. 121 Wn. App. at 381-83. In addition, both the insurer and the trial court questioned plaintiff's treating physician at the hearing. 121 Wn. App. at 379, 383.

---

[6] The trial court ultimately found that amount unreasonable and suggested that a $17.4 million settlement would be reasonable. 121 Wn. App. at 383.

Similarly, in *Mutual of Enumclaw,* the settling parties' evidence of reasonableness included expert testimony, evidence detailing what specific building repairs were at issue, the extent to which T&G was at risk for the cost of those repairs, and detailed financial information about litigation costs. 165 Wn.2d at 261. In *Heights at Issaquah Ridge Owners Association v. Derus Wakefield I, LLC,* 145 Wn. App. 698, 706, 187 P.3d 306 (2008), *review denied,* 165 Wn.2d 1029 (2009), the settling parties provided the court with expert testimony indicating "the settlement reflects a true compromise given the defects and scope of repairs," and evidence establishing that the settlement amount was 17.5 percent less than the damages plaintiff intended to seek at trial.

Here, Berg and Vision One provided no evidence to the trial court that supported their $3.3 million settlement: no expert testimony, no expert damage analysis, no discovery, not one single document. CP 206-28, 324-44, 426-33, 492-95. They relied instead on conclusory assertions by Vision One's principal and Berg's personal attorney. CP 224, 329-30. Absent any post-February 2008 evidence relevant to the settlement amount, CP 448-49, RSUI could not analyze Berg and Vision One's settlement (or the increased settlement amount) in any meaningful way, let alone challenge its reasonableness. Neither, for that matter, could the trial court. The result is that the reasonableness of the settlement is completely untested and the trial court's reasonableness determination is unreliable. Yet, that unreliable determination could serve as the presumptive measure of RSUI's liability, should the federal court determine in the coverage

action that RSUI erred when it denied coverage pursuant to its residential work exclusion. *Mut. of Enumclaw,* 165 Wn.2d at 266-67; *see* p. 2 & n.1, *supra.*

In short, by denying RSUI the brief, two week continuance it requested, by allowing the reasonableness hearing to proceed on three days notice, and by then finding reasonableness based on an inadequate record, the trial court deprived RSUI of its right to a reliable reasonableness determination. By so doing, the court failed to protect RSUI against the risk of a presumptive excess judgment or worse. *See Red Oaks,* 128 Wn. App. at 322. The prejudice to RSUI is clear and is additional reason why the trial court abused its discretion when it denied RSUI's motion for a continuance.

B. The Trial Court's Reasonableness Findings Are Unsupported by the Evidence

As explained above, there is no evidence supporting the trial court's reasonableness determination. That absence of evidence is confirmed by the trial court's failure to support its determination with specific findings of fact on critical reasonableness factors such as the amount of Vision One's damages, the merits of Vision One's liability theory, the merits of Berg's defense, or Berg's relative fault. CP 483-87; *see, e.g., Mut. of Enumclaw,* 165 Wn.2d at 264. Indeed, rather than attempting to address these critical factors, the court simply noted that they presented a "huge question of fact." 9/15 RP 53. Nevertheless, the

court entered findings to the effect that the settlement complied with all relevant reasonableness factors and was reasonable. CP 505-06.

No evidence supports the trial court's reasonableness findings. It should go without saying that if the amount of damages at issue and a particular party's liability for those damages are "huge question[s] of fact," then a trial court cannot reliably find a settlement figure to be reasonable. That is particularly true when, as here, the settling parties failed to provide the court with any evidence demonstrating the reasonableness of their settlement. By absolving Berg and Vision One of any duty to explain the bases for their settlement, the trial court failed to take the steps necessary to make a proper reasonableness determination and to thereby protect RSUI from an excess or inflated settlement. *E.g., Red Oaks,* 128 Wn. App. at 322.

The one fact the trial court did specifically find was that "[t]here is no evidence of fraud or collusion in the settlement herein." CP 505. RSUI respectfully contests that finding. Even though RSUI had no opportunity to investigate the settlement, it still presented substantial circumstantial evidence of fraud or collusion regarding the amount of the settlement, or regarding the settling parties' seemingly concerted attempt to create grounds for a bad faith claim and seek treble damages under the IFCA. Examples of that circumstantial evidence include:

- Evidence that Berg abruptly quit communicating with RSUI at the same time it apparently began negotiating with Vision One, CP 448-51;

- Evidence that until March 2008, Berg had communicated regularly with RSUI despite RSUI's coverage denial in April 2007, almost a year before, CP 332-33, 337;
- Evidence that once Berg ceased communicating with RSUI, it agreed to settle with Vision One for an amount $800,000 more than it would even consider six months before, CP 162, 451;
- Evidence that the damages that Berg agreed to attribute to RSUI went from $1,000,000 to $2,300,000 during the six months Berg was refusing to communicate with RSUI, CP 162, 451;
- Evidence that even when directed by the trial court to provide information to RSUI prior to the September 15 hearing, Berg and Vision One did not do so, CP 453-73; 9/15 RP 34-41;
- Evidence demonstrating that Berg misrepresented the nature and extent of RSUI's settlement involvement to the trial court, CP 207-08, 321-22, 333, 448-49; and
- Evidence establishing that Berg made no attempt to provide RSUI with information showing why RSUI's residential work exclusion did not apply, despite RSUI's repeated assurances that it would evaluate such information, CP 448-49; Supp. CP [9/12/08 Frye Decl. (filed 7/23/09), Exs. A-B].

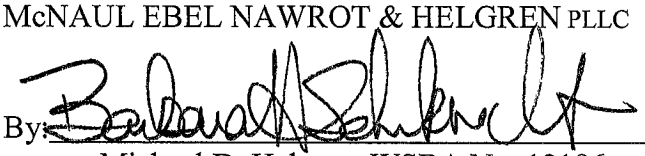
Given this evidence, the trial court erred in finding that there was no evidence of fraud or collusion in the settlement. CP 505.

VI. CONCLUSION

RSUI received three days notice of a settlement entered into by its insured. The settling parties proffered no evidence establishing that the settlement amount was reasonable. Nevertheless, and despite circumstantial evidence indicating an improper inflation of the settlement amount or other fraud or collusion, the trial court denied RSUI's request for a continuance and found the settlement to be reasonable. In so doing the trial court abused its discretion. RSUI therefore respectfully asks this Court to reverse the trial court's reasonableness determination, and remand this matter to the trial court for a fully informed assessment of the reasonableness of the settlement amount and whether the settlement resulted from fraud or collusion. Since the parties engaged in full discovery regarding the circumstances of the settlement in their federal court action, the trial court's reasonableness reassessment would require minimal time and little or no additional expense.

Respectfully submitted this 21st day of September, 2009.

McNAUL EBEL NAWROT & HELGREN PLLC

By: 

Michael D. Helgren, WSBA No. 12186
Barbara H. Schuknecht, WSBA No. 14106
David R. East, WSBA No. 31481
600 University Street, Suite 2700
Seattle, WA 98101
(206) 467-1816
Attorneys for Appellant/Intervenor RSUI

38411-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

VISION ONE, LLC, Plaintiff and Respondent,

v.

RSUI, Intervenor and Appellant,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,
Defendant and Appellant,

v.

D&D CONSTRUCTION, INC.; Defendant, Third-Party Plaintiff, and
Respondent, and

v.

BERG EQUIPMENT & SCAFFOLDING CO., INC., Third-Party
Defendant and Respondent

CERTIFICATE OF SERVICE

One Union Square
600 University, Suite 2700
Seattle, WA 98101-3143
(206) 467-1816

McNAUL EBEL NAWROT &
HELGREN PLLC

Michael D. Helgren, WSBA No. 12186
Barbara H. Schuknecht, WSBA No. 14106
David R. East, WSBA No. 31481

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 21st day of September, 2009, I caused a true and correct copy of Brief of Appellant/Intervenor RSUI to be delivered by U.S. Mail, postage prepaid, to the following counsel of record:

Counsel for Vision One LLC:	☐	Via Messenger
Jerry B. Edmonds	☑	Via U.S. Mail
Randy J. Aliment	☐	Via Facsimile
Teena M. Killian	☐	Via E-mail
Williams, Kastner & Gibbs PLLC		
601 Union Street, Suite 4100		
Seattle, WA 98101-2380		

Counsel for Respondent Berg Equipment &	☐	Via Messenger
Scaffolding Co., Inc.:	☑	Via U.S. Mail
Daniel F. Mullin, WSBA #12768	☐	Via Facsimile
Tracy A. Duany, WSBA #32287	☐	Via E-mail
Kiera M. Silva, WSBA #34897		
MULLIN LAW GROUP		
101 Yesler Way, Suite 400		
Seattle, WA 98104		

Peter T. Petrich, WSBA #08316	☐	Via Messenger
DAVIES PEARSON	☑	Via U.S. Mail
920 Fawcett Avenue	☐	Via Facsimile
P.O. Box 1657	☐	Via E-mail
Tacoma, WA 98401		

Dennis J. Perkins, WSBA #05774	☐	Via Messenger
Attorney at Law	☑	Via U.S. Mail
1570 Skyline Tower	☐	Via Facsimile
10900 NE 4th St.	☐	Via E-mail
Bellevue, WA 98004-5873		

Counsel for Respondent D&D, Inc.:	☐	Via Messenger
D. Michael Shipley, WSBA 18257	☑	Via U.S. Mail
Attorney at Law	☐	Via Facsimile
14009 42nd Avenue East	☐	Via E-mail
Tacoma, WA 98446		

Counsel for Respondent Philadelphia	☐	Via Messenger
Indemnity Ins. Co.:	☑	Via U.S. Mail
J. Dino Vasquez, WSBA #25533	☐	Via Facsimile
Celeste M. Monroe, WSBA #35843	☐	Via E-mail
KARR TUTTLE CAMPBELL		
1201 3rd Avenue, Suite 2900		
Seattle, WA 98101		

Counsel for Respondent Matthew	☐	Via Messenger
Thompson:	☑	Via U.S. Mail
William R. Michelman, WSBA #06803	☐	Via Facsimile
Attorney at Law	☐	Via E-mail
7512 Bridgeport Way W., Suite B		
Lakewood, WA 98499		

Dated this 21st day of September, 2009.

Melissa Peterson Raynor, Legal Assistant